IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19879 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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IMRANBHAI MOHMADBHAI MANSURI - Petitioner(s)

Versus

DISTRICT MAGISTRATE COLLECTORATE & 3 - Respondent(s)

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Appearance :

MR SP MAJMUDAR for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.
Mr M.I. A.SHAIKH for Respondent(s) : 3,
MR LR POOJARI, AGP for Respondent : 4.

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 08/12/2005

ORAL JUDGMENT

1. Imranbhai Mohmadbhai Mansuri(Pinjara), petitioner, has filed this petition under Articles 226 & 227 of the Constitution of India with a prayer that this Court may

issue a writ of habeas corpus or any other appropriate writ, order or direction, for quashing and setting aside the order of detention dated 22nd September, 2005, passed by the District Magistrate, Dahod - respondent No.1 detaining authority under the provisions of the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as “PBM Act”) as being illegal, invalid, null and void, suffers from total non-application of mind and violative of Articles 14, 21 and 22 of the Constitution of India. The petition was filed on 28th September, 2005.

2. My learned Brother Justice Anant S.Dave has issued Rule on 30th September, 2005, which was made returnable after 4 weeks, and that is how the matter has been placed for hearing before this Court.

3. Mr.S.P.Majmudar, learned advocate for the petitioner has invited my attention to the order of detention dated 22.9.2005 passed by the District Magistrate, Dahod. He has stated that the order of committal is also passed on the same day and the petitioner was detained in Porbandar Jail. He has also

invited my attention to the grounds stated by the authority in its order dated 22.9.2005.

3.1 The learned advocate for the petitioner has also stated that the grounds mentioned in para 5 of the impugned order where it has been stated that it will be open for the petitioner to make a representation to the District Magistrate, Dahod - respondent No.1, to the State of Gujarat through Deputy Secretary – respondent No.2 as well as to the Additional Secretary, Food and Civil Supplies & Consumer Department, Government of India – respondent No.3.

3.2 The learned advocate for the petitioner has also invited my attention to the fact that, pursuant to the aforesaid order, the petitioner through his learned advocate has made a representation to the District Magistrate, Dahod, and also to the Secretary, Food & Civil Supplies and Consumers Department and Additional Secretary, Food & Civil Supplies and Consumers Department, Government of India in this behalf.

3.3 The learned advocate for the petitioner stated that the petition raises number of questions of fact

and law, however, for the present purpose, he is confining his argument only on one ground viz as under:

3.4 He has further invited my attention to the provisions of PBM Act, particularly Sec.3(3) and Sec.3(4) of the Act which provides procedure in connection with grounds of detention. He has also invited my attention to Sec.8 of the PBM Act which provides grounds of order of detention to be disclosed to person affected by the order.

3.5 In view of the aforesaid statutory provisions and constitutional provisions, particularly, under Article 22(5) of the Constitution, the learned advocate submitted that the representation made by the petitioner to the authority on 30.9.2005. The authority has received the same on the same day. The State Government has rejected the representation on 30.9.2005 and the authority has forwarded the same to the Central Government on 1.10.2005 which was received by them on 6.10.2005. However, he submitted that the authority did not forward the same i.e., representation to the Central Government.

3.6 It may also be noted that the Central Government has filed affidavit of one Shri A.K.Ganguly, Under Secretary, Department of Consumer Affairs, Food and Public Distribution, New Delhi dated 18th November, 2005, in which the deponent has stated that the report sent by them vide letter dated 1.10.2005 was received in this department on 6.10.2005. The report was in English language and was duly examined in the Central Government and found the same in order. However, the Central Government does not state that they received the representation made by the detenu through State Government in this behalf.

3.7 The learned advocate for the petitioner stated that in view of both these affidavits, the facts emerging that the detaining authority has not send the representation to the Central Government at all in time and the Central Government could not consider the representation of the petitioner and therefore his right to make representation is violated under Article 22(5) of the Constitution of India.

3.8 In support of the same, the learned advocate has first relied upon the judgment of the Apex Court in the

case of Balchand Chorasia Vs. Union of India and others reported in AIR 1978 SC 297, particularly on page 297 & 298 which reads as under:

> “It was argued that the representation filed by the detenu through his counsel, has not been considered by the government at all. The High Court was of the view that the aforesaid representation was not given by the detenu himself but by Mr.Jethmalani in his capacity as a member of Parliament. The representation has been placed before us and it clearly recites that Mr.Jethmalani acted not as a member of the Parliament but on instructions from his client, namely, the detenu. In the circumstances, therefore, the High Court was in error in construing the representation made by the petitioner as being made not by him but by his counsel. It is manifest that the counsel had no personal matter and he was only advocating the cause of his client. In matters where the liberty of the subject is concerned and a highly cherished right is involved, the representations made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty which is engrained in Art.21 of the Constitution.

As the representation has not been considered at all by the government which it was duty bound to consider, that by itself vitiates the order of detention. We, therefore, allow this appeal and direct the appellant to be released forthwith."

3.9 A similar view has been taken by the Apex Court in the case of Amir Shad Khan and another Vs. L.Hmingliana and others reported in AIR 1991 SC 1983 where the three Judge Bench of the Hon'ble Supreme Court, Hon'ble Justice Ahmadi, J. (as he was then) in para 10 on page 1991 held like this:

" It must be realised that when a person is placed under detention he has certain handicaps and if he makes a request that a representation prepared by him may be forwarded to the Central Government as well as the State Government for consideration after taking out copies thereof it would be a denial of his right to represent to the Central Government if the Detaining Authority as well as the State Government refuse to accede to his request and omit to forward his representation to the Central Government for consideration. It is

difficult to understand why such a technical and right view should be taken by the concerned authorities in matters of personal liberty where a person is kept in preventive detention without trial. Detenus may be literate or illiterate, they may have access to legal advice or otherwise, they may or may not be in a position to prepare more than one copy of the representation and if they make a request to the authorities which have the facilities to take out copies to do so and forward them for consideration to the Central Government would it be just and fair to refuse to do so? In such circumstances refusal to accede to their request would be wholly unreasonable and in total disregard of the right conferred on the detenu by Article 22(5) of the Constitution read with Sec.11 of the Act. We are, therefore, of the opinion that the Detaining Authority as well as the State Government were not justified in taking a hyper-technical stand that they were under no obligation to take out copies of the representations and forward them to the Central Government. We think that this approach on the part of the Detaining Authority and the State Government has robbed the

appellants of their constitutional right under Article 22(5) read with S.11 of the Act to have their representation considered by the Central Government. The request of the detenus was not unreasonable. On the contrary the action of the Detaining Authority and the State Government was unreasonable and resulted in a denial of the appellants' constitutional right. The impugned detention orders are, therefore, liable to be quashed."

4. The learned advocate for the petitioner has invited my attention to an Unreported judgment of this Court in the matter of Special Criminal Application No.765 of 1993 and others in the case of Jitubhai Nichhabhai Patel Vs. District Magistrate, Valsad, decided by this Court (Coram: K.G.Shah & K.R.Vyas, JJ.) dated 28.7.1993 wherein the contention which has been raised by the learned APP in this case, the same has also been raised namely when the representation made by the advocate, a different consideration should be applied. The Division Bench in para 5 has held like this:

"Mr.Y.F.Mehta, Ld.APP, however, very strenuously contended that as the representation in question

has been drafted and forwarded by Mr.M.C.Kapadia, an advocate who is well-versed in detention laws, it was not obligatory for the detaining authority to forward the copy of the representation to the Central Government for, the detenu was assisted by an able Counsel who knows the procedure and modality of making the representation to the Central Government, and who also knew that if the detenu wanted to make a representation to the Central Government, such a representation could be directly sent to the Secretary, Ministry of Civil Supplies and Public Distribution, Government of India, and once the detenu was so assisted by an able Counsel, the detaining authority no longer remained duty bound to forward the detenu's representation to the Central Government. The submission of Mr.Mehta, Ld.APP, so heavily made by him, in our opinion, should not detain us any further, and is required to be stated merely for being rejected. Merely because the detenu has been assisted by an Advocate, that does not absolve the detaining authority from its duty to forward the detenu's representation to all the authorities who have a right to consider the

representation, and if found acceptable to accept it, if the detenu or his accredited representative makes a request in that behalf. Here, a specific request in that connection has been made by Mr.Kapadia, the learned Counsel in the representation. Once such a request is made, the duty of the detaining authority to forward the representation to the authorities mentioned in the grounds of detention commences, and that duty would not come to an end merely because the request on behalf of the detenu has come from an advocate, who is supposed to know the provisions of the detention law. If the submission of Mr.Mehta, LAPP is accepted, that would lead to creating discrimination between a class of detenues who are not represented by Advocate and the other class of detenues who are so represented. Even amongst the class of detenues who are represented by advocates, there could be sub-class, viz., detenues who are represented by junior advocates and those who are represented by senior advocates. Such a classification of detenues would be unwarranted under the constitutional conspectus, and the detention

jurisprudence. Therefore, without saying much on the point, we would only say that the submission of Mr.Mehta, which is so forcefully made on the ground that in the present case as the detenu has been represented by the advocate and that the advocate has made the representation, the detaining authority was absolved from its duty to forward the representation to the Central Government, cannot be accepted. That contention is rejected."

5. From the record it appears that again matter reached before another Division Bench of this Court raising identical issue. At that time, it appears that the Government has made one more effort to persuade another Bench that even though there is already a Division Bench judgment of this Court, this Division Bench may take a different view. In that circumstances, I note the judgment of this Court in the case of State of Gujarat and others Vs. Hemantkumar Dinkarrai Desai and another reported in 1996(2) GLH 277 (Coram: C.K.Thakker, J. (as he was then) & S.D.Pandit, J.). In that case the Division Bench has relied upon earlier judgment of the Division Bench in the case of Jitubhai

Nichhabhai Patel (supra) and after referring to the same, the Division Bench on page 279 observed as under:

> “We do not find any reason to take a different view than the view taken by the earlier Division Bench of this Court.” After observing that the Division Bench observed that in this case namely in the case of Hemantkumar Dinkarrai Desai (supra), the detenu had given his representation to the detaining authority and in the representation he had stated that along with his representation, one more copy is being supplied to the detaining authority so as to enable it to forward the same to the Central Government. In spite of the specific request made to the detaining authority, the detaining authority had not forwarded the same to the Central Government. In that light of the circumstances, the learned Single Judge has allowed the petition and the LPA was filed against the said judgment. Considering that aspect the Division Bench further observed therefore in the circumstances the learned Single Judge is justified in accepting the Spl.C.A., the order passed by the learned Single Judge is quite legal and proper. In the circumstances, the LPA is dismissed with no

order as to costs."

6. Mr.L.R.Poojari, learned AGP appears on behalf of the State and the detaining authority. He has stated that the detaining authority has filed the affidavit of Mamta Verma, District Magistrate, Dahod, dated 14th November, 2005. Over and above on behalf of respondent No.2, Mr.H.C.Kadia, Deputy Secretary, Food, Civil Supplies & Consumer Affairs Department, State of Gujarat has also filed the affidavit dated 29th November, 2005. It was stated that the order of detention was passed on 22.9.2005 by the District Magistrate, Dahod, and he has forwarded the report under Sub-sec.(3) of Sec.3 of the PBM Act, and it is approved by the Government on 1.10.2005. It was stated that after approving the order of detention, the State Government has reported the facts to the Central Government alongwith the order of detention and with all other relevant material by speed post letter dated 1.10.2005 i.e., within the prescribed time limit of seven days as per Sub-sec.(4) of Sec.3 of the PBM Act. It was also stated that the representation of the petitioner was also made to all concerned authorities and the Food, Civil Supplies & Consumer Affairs

Department received the same on 30.9.2005 and it was put up before the Deputy Secretary on the same day and the Hon'ble Minister of Civil Supplies has rejected the representation on 30.9.2005 and as the file received back on 30.9.2005 the detenu was informed about the rejection of the representation by a letter dated 30.9.2005 through jail authority. He submitted that the arguments of the learned advocate for the petitioner may not be accepted because in this case the representation has been made by advocate and therefore this Court may not take up such hyper technical contention in this behalf. He submitted that when the detenu himself has made representation, the Court may be right in taking the view that if the Government fails to send the representation to the Central Government then the same may be violation of the Constitution of India. But if the representation made by advocate who is aware about the procedure of law and therefore it is not an obligation to the State Government in this behalf.

7. In my considered view, from the facts stated herein, the representation made by the petitioner on 30.9.2005 and the same was rejected on the very same day i.e.,

dated 30.9.2005. The report sent by the Government on 1.10.2005 which was received by the Central Government on 6.10.2005, and therefore there is delay in sending the report by the State Government to the Central Government. Though the State Government had filed an affidavit but the State Government has failed to satisfy this Court as to when they received the representation and when they send the representation to the Central Government in this behalf. In view of the fact that the representation has not been sent to the Central Government, naturally the Central Government will not be able to consider the said representation. Therefore, the fact that the State Government failed and neglected to send the representation to the Central Government, and thereby non-consideration of representation by the Central Government in both the circumstances, the valuable right of the detenu i.e., to consider his representation in view of Article 22(5) of the Constitution is violated.

8.1 What is the latest position of law regarding Preventive Detention?

8.2 “... In case of preventive detention of a citizen,

Article 22(5) of the Constitution enjoins the obligation of the appropriate Government or the detaining authority to accord the detenu the earliest opportunity to make a representation and to consider that representation speedily. The right to make a representation implies the right of making an effective representation. It is the constitutional right of the detenu to get all the grounds on which the order has been made. As has been said by Benjamin Cardozo, "A Constitution states or ought to state not rules for the passing hour but the principles for an expanding future." The concept of grounds used in the context of detention in Article 22(5) has to receive an interpretation which will keep it meaningful, in tune with contemporary notions of the realities of the society, and the purposes of the Act in the light of concepts of liberty and fundamental freedoms."

(Re: Judgment of the Apex Court in the case of Union of India Vs. Paul Manickam and another reported in (2003) 8 SCC 342, particularly para 7 on page 350)."

8.3 “So far as the pivotal question whether there was delay in disposal of the representation is concerned, the same has to be considered in the background of Article 22(5) of the Constitution. A constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a representation against detention, as imperated in Article 22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenu is based on the subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Article 22(5) invalidates the detention order. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in Thomas Pacham

Dale's case:

> “Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.”

(Re: Thereafter para 12 on page 352 the Hon'ble Apex Court in case of Paul Manickam (supra) has observed like this.)

9. As regards procedural safeguards is concerned, the Hon'ble Supreme Court in the case of Union of India Vs. Paul Manickam and another (supra) has also considered the procedural safeguards particularly paragraphs 8, 9, 12 and 16 in this behalf.

10. The view which I have taken which is based upon two earlier judgments of Apex Court as well as earlier Division Bench judgments of the Hon'ble Supreme Court,

recent judgment of the Hon'ble Supreme Court in the case of Paul Manickam (supra) is also supported by a judgment of this Court in Special Civil Application No.15403 of 2005 in the mater of Sanjay Dayalji Chandan Vs. State of Gujarat decided by my learned Brother Justice Anant S.Dave dated 21.9.2005. In that case there was delay in sending the representation and on internal page 11 my learned Brother Justice A.S.Dave has observed like this:

> “Therefore, a records speak for itself and there is a clearly delay of about 10 days in forwarding the representation by the detaining authority to the State of Gujarat. Not only that, but, though averred by the detaining authority that the representation was forwarded to various authorities, the affidavit in reply filed by the Under Secretary of the Department of Consumer Affairs, Food and Public Distribution, Union of India in the affidavit dated 23rd August, 2005, in para-5 stated that the representation dated 19th July, 2005, was not received by the concerned section in the department. Thus, the valuable right of the detenue for expeditious disposal of

the representation against the order of detention stands infringed. The delay of 10 clear days in forwarding the representation by the detaining authority is not even explained much less reasonably. Though, averred in Affidavit in reply by the detaining authority, that the representation was sent to various authorities, the affidavit in reply filed by Union of India, respondent no.4 reveals non-receipt of representation, though forwarded by the detaining authority as stated in affidavit in reply, the detenue is entitled to the benefits and the safeguards guaranteed under Article 22(5) of the Constitution of India."

11. I have therefore considered the judgment of the Apex Court in the case of Balchand Chorasia (supra), Amir Shad Khan (supra), Unreported judgment of this Court in the case of Jitubhai Nichhabhai Patel (supra) and also another Division Bench judgment of this Court in the case of Hemantkumar Dinkarrai Desai (supra). I have also considered the recent judgment of the Apex Court in the case of Paul Manickam (supra). In view of this fact when the State Government has failed and neglect to send the representation made by the detenu

to the Central Government, and therefore, obviously the Central Government could not able to consider the representation of the petitioner. In view of the same, the petitioner's valued right i.e., his representation to be considered under Article 22(5) is violated. In view of the same, on this ground alone, the order of detention is required to be quashed and set aside.

12. For the foregoing reasons, the petition is allowed. The impugned order dated 22.9.2005 passed by the respondent No.1 authority is quashed and set aside. The detenu-Imranbhai Mohmadbhai Mansuri (Pinjara) is ordered to be set at liberty forthwith unless required in any other case. Rule is made absolute. Direct service is permitted.

(K.M. Mehta, J.)

syed/